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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1618

HERBERT MARTIN GIMELSTOB, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioner Herbert Martin Gimelstob respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on February 21, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit, rendered on February 21, 1973, is not yet reported and is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

The petitioner Herbert Martin Gimelstob, on June 2, 1972, received a sentence of imprisonment and fine by the United States District Court for the District of New Jersey, following a jury conviction on various charges stemming from the taking and possession of tin ingots while still in foreign commerce. The judgment of conviction was affirmed on appeal by the Court of Appeals for the Third Circuit on February 21, 1973. The Third Circuit, on April 4, 1973, denied a timely petition for rehearing *en banc* that had been filed by the petitioner Gimelstob. See p. 13a, *infra*.

On April 23, 1973, Mr. Justice Brennan signed an order extending the time for filing this petition to and including June 2, 1973. This petition has been filed within that extended period.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a fair trial has been accorded a co-defendant in a federal conspiracy case where (a) the co-defendant was acquitted of conspiracy at the end of the trial by the trial judge, (b) the jury was not told of such acquittal, and (c) the jury was not instructed that the highly prejudicial conspiracy evidence admitted against the co-defendant was not to be used in considering the co-defendant's guilt on related substantive counts.

2. Whether, in a prosecution under 18 U.S.C. § 111 for having, in a non-criminal manner, impeded, intimidated or interfered with a federal officer in the performance of his official duties, the Government must

prove that the defendant had knowledge of the official status of the federal officer at the time of the intimidation or interference.

3. Whether, in the context of a prosecution under 18 U.S.C. § 659 for having in possession certain goods stolen while still moving in foreign commerce, the statutory proscription becomes inapplicable upon proof that the goods were stolen after they had been unloaded from aboard ship and after they had been delivered to and warehoused by the ultimate consignee.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Section 111:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

United States Code, Title 18, Section 659:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or

which are a part of or which constitute an interstate or foreign shipment or freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

* * * * * * * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * * * * * *

STATEMENT OF THE CASE

The petitioner Gimelstob, with eight others, was charged in a four-count indictment as follows:

(1) Count I alleged a conspiracy among all the nine defendants to steal, take and carry away 220,000 pounds of tin ingots from the warehouse of International Terminal Operators (I.T.O.) at Port Newark, New Jersey, between August 28 and 31, 1970, while the same was in foreign commerce, in violation of 18 U.S.C. § 371.

(2) Count II charged only the defendant Micliz with the theft and carrying away of the 220,000 pounds of tin ingots from I.T.O. while moving as a part of foreign commerce, in violation of 18 U.S.C. § 659.

(3) Count III charged all nine defendants with knowingly possessing the 220,000 pounds of tin ingots, which had been stolen while moving in foreign commerce, knowing the same to have been stolen in violation of 18 U.S.C. § 659.

(4) Count IV charged the petitioner Gimelstob and one of his co-defendants, Tremarco, with forcibly assaulting, opposing, impeding and interfering with Special Agent Robert McCluan, of the Federal Bureau of Investigation, while he was engaged in the performance of his official duties, in violation of 18 U.S.C. § 111.

The petitioner Gimelstob and certain co-defendants moved to suppress about 190,000 pounds of the stolen tin ingots which had been seized from a garage in Newark, as the result of the execution of a search warrant by F.B.I. agents. Following a hearing, the District Court denied this motion to suppress on October 15, 1971.

The case came on for trial before District Judge Leonard I. Garth and a jury on February 15, 1972.[1] At the conclusion of the Government's case, the District Court granted the defendant Siegal's motion for judgment of acquittal, while reserving decision on the petitioner Gimelstob's motion for acquittal on Count I. At the close of the entire case, the court granted Gimelstob's motion for acquittal on Count I, the conspiracy count, for failure of proof.

On March 15, 1972, the jury returned verdicts of guilty as to defendants Sherman and Friedlander on Counts I and III, as to defendant Tremarco on Counts I, III and IV, and as to petitioner Gimelstob on Counts III and IV. On June 2, 1972, Gimelstob was sentenced

[1] On that date, the co-defendants Bogin, Ira Zuckerman and Emanuel Zuckerman pleaded guilty to Count I and were severed from the trial. On the same date, the co-defendant Mieliz (then a fugitive) was severed from the trial and a bench warrant was issued for his arrest. The defendants Bogin and Ira Zuckerman subsequently testified on behalf of the United States.

to three years imprisonment and a $5,000 fine on Count IV, and to four and one-half years imprisonment and a $5,000 fine on Count III, the two terms to run concurrently. Thus the petitioner's total sentence was seven and one-half years imprisonment and $10,000 in fines. The Third Circuit affirmed petitioner's conviction under Counts III and IV.

A. The Use of the Conspiracy Evidence

As indicated, the petitioner Gimelstob's motion for acquittal as to Count I, the conspiracy charge, was granted at the end of the trial. But the court refused petitioner's request that the jury be charged that the conspiracy count had been dismissed as to him (Tr. 3260-1). Instead, the jury was charged as follows:

> "I charge you now that the particular defendants with which you are now concerned as to Count I are Friedlander, Sherman and Tremarco. The defendant Gimelstob has been severed as to Count I. You are not to speculate upon or draw any inference with respect to that severance. By reason of that severance you are not to render any verdict as to the defendant Gimelstob with respect to Count I." Tr. 3556.
>
> * * * * * * * *
>
> "As you recall, Mr. Gimelstob has been severed as to Count I. Any evidence adduced as to Gimelstob with respect to the charges contained in Count I is not to be considered by you as against Mr. Friedlander, Mr. Sherman and Mr. Tremarco in connection with the charges against them under Count I. Obviously, such evidence may not be considered as against Gimelstob, either, as to Count I, for he has been severed. However, you may consider evidence that has been adduced as against Gimelstob with respect to the charges

against him contained in Count III and IV, and I will get to that in just a moment. This is a little question which I have decided and you must accept my findings on this question." Tr. 3572.

Fairly read, this charge instructed the jury that it could, in its consideration of Gimelstob's guilt under Counts III and IV, consider the evidence admitted against Gimelstob under the conspiracy count, Count I. Indeed, the charge suggested an invitation to the jury to use, without restriction or limitation, any and all "evidence that has been adduced as against Gimelstob with respect to the charges against him contained in Counts III and IV."

Thus the jury was enabled to assess the possession and assault charges against Gimelstob in the light of the highly prejudicial and wide-ranging evidence as to the conspiracy. Much of that evidence was supplied by the co-defendant Bogin, who had pleaded guilty and testified on behalf of the Government.

The evidence produced by the Government showed a conspiracy that was both sophisticated and sensational. The conspiracy involved the planning and execution of a scheme to carry away about 220,000 pounds of tin ingots from the I.T.O. warehouse in Port Newark. Four trailer trucks, rented by the fugitive Micliz, were used to transport the ingots; the drivers of the trucks produced false invoices and other documents to secure the ingots from the warehouse personnel and they were able to avoid all other security procedures then in effect at Port Newark. The theft was not discovered until four days later. By then, the ingots had been transported to a private garage in Newark and moved from there to various other locations in the area.

Also included in the conspiracy evidence adduced by the Government was: (1) testimony that one of the co-conspirators had threatened the life of another to keep him from revealing their criminal conduct, (2) testimony of prior crimes by some of the co-conspirators that involved the same type of criminal activity, and (3) testimony and proof of falsification of records by certain co-conspirators in order to conceal the criminal acts here involved. Gimelstob was not shown to have played any part in, or to have had knowledge of, any of these events. But since Gimelstob was still an alleged co-conspirator during the course of the trial, this prejudicial evidence was admitted at that time against Gimelstob.

Gimelstob's involvement in the case, the jury found, occurred several days after the theft and then only with respect to the constructive possession of some of the stolen tin (Count III) and his interference with the unmarked vehicle of one of the surveilling F.B.I. agents (Count IV). The testimony submitted by the Government indicated that (1) Gimelstob, on the day in question, got into his own car at the sound of a honking horn and thereupon maneuvered the car so as to cut off the F.B.I. agent's vehicle that was in hot pursuit of a van carrying stolen tin, and (2) Gimelstob was seen talking to two of the co-defendants (Friedlander and Sherman) and was seen emerging from his father's store on two occasions with those two defendants. With respect to Gimelstob's claim that this evidence was insufficient to convict him of constructive possession of stolen property under Count III, the Third Circuit found it unnecessary to resolve that claim since "there was sufficient evidence to convict . . . [Gimelstob] under 18 U.S.C. § 2 as aiding and abetting an offense." See p. 9a, *infra*.

The Third Circuit sought to dispose of Gimelstob's complaint that the jury had been allowed to use the prejudicial conspiracy evidence in finding him guilty of constructive possession and interference with the F.B.I. agent. It did so first by stating and then ignoring the Complaint; it then construed the argument as one directed to the trial court's failure to marshall and segregate the evidence. The court said as to marshalling that, no objection of this nature having been made at trial, "he cannot raise this argument in the absence of plain error . . . [and] we do not think that such error, if any, existed." See p. 11a, *infra*. The Third Circuit added that Gimelstob's contention that the jury should have been instructed that he had been acquitted, rather than severed, as to the conspiracy count "is unsupported by legal authority, and we dismiss it." See p. 11a, *infra*.

B. The Instruction as to 18 U.S.C. § 111

As the Third Circuit noted (p. 9a, *infra*), the petitioner Gimelstob claimed "that the district court was incorrect to refuse to charge that under 18 U.S.C. § 111, it is necessary for the actor to know that the person interfered with was a federal officer." Citing cases, the Third Circuit ruled (p. 10a, *infra*) that "We have held that such knowledge is not necessary for a person to be convicted under § 111."

That ruling was superimposed upon the Third Circuit's additional holding (p. 10a, *infra*) that Gimelstob's conviction under Count IV must be affirmed "since there was ample evidence that the [F.B.I.] agent in this case was forcibly opposed, impeded, and interfered with." The court thus avoided resolution of Gimelstob's additional claim that the instruction as to

an "assault," as used in § 111 and in Count IV, was erroneous and that the assault charge should have been stricken in its entirety in view of the evidence. Thus Gimelstob's conviction under Count IV was sustained on evidence that he violated that portion of § 111 that punishes one who forcibly "opposes, impedes, . . . or interferes" with a federal officer, and not under that portion that punishes one who "forcibly assaults" such an officer. It was on that basis that the Third Circuit concluded that the Government need not prove that Gimelstob knew that the person he impeded or interfered with was an F.B.I. agent and that the jury need not be instructed that such knowledge must be found.

The evidence adduced in support of the determination that Gimelstob did forcible oppose, impede or interfere with a person who, unknown to Gimelstob, turned out to be an F.B.I. agent named McCluan may be summarized as follows:

Agent McCluan testified that he was engaged in surveillance of the area near the private garage where the stolen tin had been stored. Driving an unmarked car, McCluan followed a blue van for several blocks as it pursued an evasive course. Finally, the van slowed and McCluan observed a green Lincoln parked on the street ahead of the van and a man standing next thereto. That man, identified as Gimelstob, entered the Lincoln as McCluan followed the van around a corner. At this point, McCluan heard tires squealing and the Lincoln, with Gimelstob driving, passed McCluan's car. The Lincoln proceeded diagonally in front of McCluan's car and slowed considerably, "popping" its brakes and forcing McCluan to "jam" on his brakes. Simultaneously, another car driven by the

co-defendant Tremarco drove along the left side of McCluan's car so that McCluan could not pass the Lincoln. Having traveled one block in this manner, the van turned left, the Lincoln proceeded straight ahead and Tremarco proceeded ahead of McCluan's car, preventing it from following the van. When Tremarco and McCluan were both stopped by a traffic light, Tremarco got out of his car, engaged McCluan in conversation and finally struck McCluan in the face through the open car door window. During this confrontation, McCluan identified himself as a F.B.I. agent and Tremarco was placed under arrest. But McCluan admitted that at no time had Gimelstob in any way attempted to strike McCluan's car or to back into it. And Gimelstob was in no way involved in the confrontation scene between McCluan and Tremarco. See Tr. 801-813, 1012, 1101-1104, 1379-1380. There was, of course, no evidence that Gimelstob knew that McCluan was a F.B.I. agent or any other kind of a federal officer.

C. The Evidence of Foreign Commerce

Count III of the indictment had charged Gimelstob and the other defendants with knowingly possessing the 220,000 pounds of tin ingots, knowing them to have been stolen while still moving in foreign commerce, in violation of 18 U.S.C. § 659. And in the course of affirming Gimelstob's conviction under that count, the Third Circuit rejected the contention "that the government did not establish that the tin was in foreign commerce at the time it was stolen." See p. 12a, *infra*.

At the trial, the evidence established that the tin ingots had been loaded aboard a ship in Thailand under ocean bills of lading, which made Phillips Brothers

the owner of the tin upon the loading in Thailand and the consignee of the tin at the Port of New York. Tr. 1493-1494, 2729. The ship arrived on August 22, 1970, at Port Newark, and the tin was completely unloaded by August 24, having cleared customs on August 23. Tr. 382-392, 2734. On August 25 and 26, Pidgeon and Co., acting on behalf of the consignee, weighed the tin and broke it up into lots, the records thereof being turned over to Phillips. Tr. 283-286, 2730. All of this weighing and breaking occurred within the I.T.O. warehouse, I.T.O. then being a warehouseman of the tin ingots for Phillips until the ingots were removed pursuant to delivery orders to be issued by Phillips. Tr. 271-274, 282-283, 1518-1519; 2741. Phillips in fact issued delivery orders for all of the tin on August 26 and 27 (Tr. 2742-2746, 289-294), and some of the tin was actually delivered pursuant to such orders prior to the theft on August 28.

The District Court denied motions to dismiss for lack of proof of foreign commerce and hence lack of federal jurisdiction over the theft.[2] Instead, the question of foreign commerce was submitted to the jury. With respect to Count III, the possession count, the charge to the jury stated:

> ". . . the property must either be moving in or be a part of the foreign shipment at the time of the theft. In this connection I charge you that the deposit of tin in a warehouse may under cer-

[2] While 18 U.S.C. § 659 deals with theft of goods moving in either interstate or foreign commerce, the indictment in this case alleged only foreign commerce. Thus the Government had the burden of establishing that the tin was still moving in or was a part of foreign commerce at the time of the theft and could not rely upon any subsequent interstate movement after the consignee had taken possession.

> tain circumstances constitute a coming to rest, marking the termination of a foreign shipment. It may be, however, that the stop-off at the warehouse may be only a pause in the course of an uncompleted journey. Standing alone, the removal of the goods to a warehouse is not conclusive, nor is the consignee's powers to divert the goods from foreign commerce. These are merely factors to be considered, and the answer in any particular case must depend upon your factual assessment. A pause in the journey will not terminate the foreign character of the shipment if there is a clear intention to resume the journey after such pause to the ultimate destination." Tr. 3575-3576.[3]

Both sides objected to this charge, the Government contending that foreign commerce continued until the goods were delivered to the ultimate consignee-parties holding delivery orders from Phillips Brothers. Tr. 3509. And, since there had been no proof of preexisting contracts or clearly recognized consignees acting through agents, the court's charge clearly allowed the jury to find foreign commerce on the basis of the possibility that Phillips Brothers, the consignee, may have intended at some time to move the tin to further destinations.

Making no reference to the charge or the fact that the issue had been submitted to the jury, the Third Circuit found that the tin was still in foreign commerce at the time of the theft. See p. 12a, *infra*. The court stated that each case must be evaluated on its

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[3] A similar charge as to foreign commerce was made with reference to Count I, the conspiracy count. That charge reiterated that "there is no absolute requirement that the flow of commerce be continuous, that is, consistently moving toward the ultimate destination. . . . if there is a clear intention to resume the journey after the pause to the final destination." Tr. 3568-3569.

own particular facts, i.e., "one must examine the relationship between the consignee, the consignor, the carrier, the indicia of foreign commerce at the time of the theft and the congressional intent." And the court here found that the evidence "showed that although the tin had reached port and been unloaded to a warehouse, it was still being held by the shipper under the original bills of lading . . . [and] where the tin had not yet been picked up and was still being held by the shipper under its original bills of lading, delivery had not yet occurred." See p. 12a, *infra*. Citation was made to the statement in *United States* v. *Yoppolo*, 435 F.2d 625, 626 (6th Cir. 1970), that "An interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered."

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit, as it affects the petitioner Gimelstob, raises both important problems and conflict of decisions with respect to three matters of concern to this Court:

(1) The administration of criminal justice in the federal courts, particularly with respect to the duty of a trial judge to take all steps possible, following the court's acquittal of a defendant of all conspiracy charges, to avoid any prejudicial impact of the conspiracy evidence on the jury's consideration of other charges against the defendant.

(2) The proper interpretation and application of an important federal criminal statute, 18 U.S.C. § 111, particularly with respect to the necessity that the defendant know that the person whom he has impeded was a federal officer.

(3) The proper definition of the termination of foreign commerce, a concept of wide application in federal law and of specific concern here in terms of applying 18 U.S.C. § 659.

These three factors combine to make appropriate the grant of this petition for writ of certiorari, as the following considerations demonstrate.

1. The Third Circuit's permissive attitude toward the use of the prejudicial conspiracy evidence is destructive of the right to a fair trial and is in conflict with the decisions of other courts, particularly the Second Circuit.

The petitioner Gimelstob was here acquitted by the trial judge of all conspiracy charges, but only after the prejudicial evidence respecting the criminal actions of the alleged co-conspirators had been heard by the jury. At this juncture, at the end of the trial before submission of the other counts to the jury, what was the duty of the trial judge to insure that such prejudicial evidence would not be used by the jury in assessing the petitioner's guilt as to the other charges? All that the trial judge here did was to tell the jury, incorrectly, that the petitioner had been "severed" rather than "acquitted" of the conspiracy charge; and the judge went on to instruct that any evidence adduced against petitioner could be considered with respect to the other charges of possession and interference. What assurance is there from the instruction that the jury did not consider the highly inflammatory conspiracy evidence in its consideration of the other charges against petitioner?

(1) The Third Circuit here made no attempt to assess the action of the trial judge in light of the standards laid down by this Court in *Schaffer* v. *United States,* 362 U.S. 511, 516 (1960). While the Court

there declined to "fashion a hard-and-fast formula," it did emphasize that in a situation where a conspiracy count has failed during a trial "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." And the Court added that where the conspiracy charge fails for lack of sufficient evidence "a trial judge should be particularly sensitive to the possibility of such prejudice." The trial judge in *Schaffer* was found by the Court to have been "acutely aware of the possibility of prejudice" and to have been "strict in his charge." But here the trial judge, despite assurances that the matter would be "taken care of" in the charge (Tr. 3261-2), utterly failed to warn the jury against using the conspiracy evidence as to the petitioner.

The only references to this problem of the trial judge's duty to be found in the Third Circuit's opinion are four-fold and entirely inadequate (pp. 10a-11a, *infra*): (a) the Third Circuit mentions but totally ignores Gimelstob's claim that the jury should have been instructed as to the acquittal on conspiracy charges "since otherwise it would use evidence on that ground against appellant when it considered the other charges against him"; (b) the Third Circuit notes that Gimelstob "also contends that the district court should have marshalled and segregated the evidence as to him in its charge" and then finds that Gimelstob failed to object in the trial court to the failure so to marshall the evidence as the Third Circuit had previously required; (c) the Third Circuit adds that, in any event, "we do not think that such [plain] error, if any, existed"; and (d) the Third Circuit concludes with the remark that the alleged error in charging that petitioner had been "severed" rather than "acquitted" is "unsupported by legal authority, and we dismiss it."

But where is there any insistence by the Third Circuit that the trial judge in this case should be bound by the *Schaffer* "continuing duty at all stages of the trial" to take effective action to guard against prejudicial use of the conspiracy evidence and to be "particularly sensitive to the possibility of such prejudice"?[4] Was the *Schaffer* decision a meaningless gesture by this Court, a decision to be ignored by lower courts in their assessment of trial judges' actions of this nature? Was the trial judge's duty to take steps to insure a fair trial in this context somehow lifted by the failure of the petitioner to raise one facet (the so-called marshalling of the evidence argument) of the basic objection to the unlimited use of the conspiracy evidence? Can the Third Circuit's conclusion that there was no "plain error" be accepted where there is no indication that the prejudicial conspiracy evidence was not used by the jury in considering the substantive charges and where the trial judge was not "strict in his charge" in the respect, unlike the situation in *Schaffer*?

(2) The Third Circuit's failure to insist upon obedience to the *Schaffer* standards of effective trial court action brings it into conflict with the decisions of other courts, particularly those of the Second Circuit. In *United States* v. *Patrisso*, 262 F.2d 194 (2nd Cir. 1958), a case virtually on all fours with the instant one, the Second Circuit ordered a new trial for a defendant who

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[4] When asked to charge that the petitioner had been acquitted of conspiracy, the trial judge replied that this would be prejudicial to the Government and that "All I will do is state that they are not to infer anything from the fact that Count I no longer pertains to Mr. Gimelstob. That is all I will do." Counsel then responded: "And not to consider any evidence." To which the court replied, "Yes, with respect to him. I think you will find in the charge . . . that that is taken care of." Tr. 3261-2. But the matter was not "taken care of."

had been acquitted by the trial judge of a conspiracy charge involving 18 U.S.C. § 659 but who, like the petitioner Gimelstob, had been convicted by the jury of possessing stolen property in violation of § 659. That conviction was reversed despite the fact that the trial judge had conscientiously tried to instruct the jury that the damaging conspiracy testimony should not be considered against the defendant Mankes in conjunction with the possession charge. In the words of the Second Circuit:

> "There being insufficient proof to connect Mankes with the conspiracy, he was acquitted [at the end of the Government's case]. Thus the very basis for the admission of the proof against Mankes was destroyed. However, there was no way to obliterate the [conspiracy] proof from the minds of the jury. In a most able charge the trial judge attempted to do so but Mankes' conviction [on the possession charge] upon the scanty proof applicable to him is indicative that the atmosphere created against Mankes was too strong to be overcome by mere instructions." 262 F.2d at 197.

To make the conflict with the *Patrisso* case more complete, it should be recalled (see p. 8, *supra*) that the petitioner Gimelstob's conviction as to the possession charge was based upon "scanty proof" of a constructive possession of the tin ingots, arising out of his presence in a car seeking to impede the capture of a van containing some of the ingots. As in *Patrisso,* the prejudicial atmosphere created by the conspiracy evidence was doubtless too strong to be overcome and doubtless accounted for Gimelstob's conviction on the related substantive charges.

Indeed, the conflicting decision in *Patrisso* indicates that even a proper instruction to the jury, carefully

charging that the conspiracy evidence should be ignored as to the one defendant acquitted of the conspiracy, simply cannot cure the prejudice. Such was also the holding of the Second Circuit in *United States* v. *Wolfson,* 437 F.2d 862, 868 (2nd Cir. 1970), in a slightly different context involving the court dismissal of a prejudicial portion of a conspiracy charge, followed by an instruction to the jury to disregard such prejudicial testimony in considering the remaining portions of the conspiracy charge. As the Second Circuit stated:

> "Merely to instruct the jury at the end of the case and in the charge to disregard four weeks of proof directed to stock fraud was probably an exercise in futility exemplified by *Krulewitch* [336 U.S. 440] and *Delli Paoli* [352 U.S. 232] and finally resolved realistically by *Bruton* [391 U.S. 123]. In short, no matter what instructions were given, it is more than doubtful that the minds of the jury could be wiped as clean as a blackboard or slate. Even had the Court earlier in the trial by the strongest instructions told the jury that the stock purchase fraud and four weeks of testimony thereon were to be expunged from their minds, this court would doubt (along with Mr. Justice Jackson and others) that such mental gymnastics would be possible. Whether instructions timely given would have enabled the jury to deliberate on the real questions ultimately posed by the Court and the government . . . an appellate court will never know, but our developed concepts of a fair trial call for serious consideration of the likelihood of prejudice." 437 F.2d at 869-870.

See also *Bruton* v. *United States,* 391 U.S. 123, 126 (1968); *United States* v. *Kelly,* 349 F.2d 720, 759 (2nd Cir. 1965); *United States* v. *Gougis,* 374 F.2d 758, 762 (7th Cir. 1967). Other courts, however, have felt that appropriate instructions may overcome the prejudice;

but such instructions were simply not given in the instant case. See *Leach* v. *United States*, 402 F.2d 268 (5th Cir. 1969); *United States* v. *Manfredi*, 275 F.2d 588, 593 (2nd Cir. 1960), decided prior to this Court's decision in *Schaffer*. And even if instructions were considered capable of overcoming the prejudicial impact of the conspiracy evidence, the very minimum instruction allowable would have been a direction marshalling the evidence in such a fashion as to place before the jury the difference between the evidence against the acquitted and the non-acquitted alleged conspirators. See *United States* v. *Kelly*, 349 F.2d 720, 757 (2nd Cir. 1965). On that theory, the decision below directly conflicts with *Kelly*.

Enough has already been decided to indicate that the decision below deals with a very fundamental aspect of the right to a fair trial by jury, an aspect that should not be resolved in terms of the "plain error" doctrine. The decision below affords an opportunity on review for this Court to develop further some of the standards implicit in this Court's *Schaffer* opinion, which have generated the Second Circuit rulings that conflict with the Third Circuit's result in this case.

2. The Third Circuit's ruling that scienter need not be proved in a non-assault violation of 18 U.S.C. § 111 raises an issue as to which lower courts are divided.

Consistently with what may be the majority rule, the Third Circuit has ruled that, for purposes of a non-assault violation of 18 U.S.C. § 111,[5] it is not nec-

[5] The Third Circuit carefully refrained from affirming petitioner's conviction under § 111 on the theory that he assaulted the F.B.I. agent from overtaking the van. The conviction was sustained solely on the theory that by so maneuvering the petitioner forcibly impeded, intimidated or interfered with the F.B.I. agent in the performance of his official duties. See p. 10a, *infra*.

essary that the Government prove that the actor knew the person with whom he interfered was a federal officer then performing his official duties. The Third Circuit so held in reliance on its own earlier opinion in *United States* v. *Goodwin*, 440 F.2d 1152 (3rd Cir. 1971), which was said to be in accord with cited decisions of the Second, Fourth, Fifth, Eighth and Ninth Circuits. See p. 10a, *infra*.

But the Third Circuit's opinion in *Goodwin* reveals that this is an issue that has long divided the Circuits and that there has been no definitive resolution of the problem by this Court. As stated in *Goodwin*,

> "Primarily in dictum, a few courts have implied that there may be a distinction between those acts in Section 111 which would be crimes regardless of the person against whom they are committed, such as assault, and those which derive their criminality solely from the fact that they are committed, such as assault, and those which derive their criminality solely from the fact that they are committed against a law enforcement officer, such as resisting arrest. These courts have suggested that perhaps scienter should be an essential element of the latter but not of the former." 440 F.2d at 1155.

The Third Circuit cited what it called dictum as to the need for proving scienter in opinions from the Second, Fourth and Fifth Circuits: *United States* v. *McKenzie*, 409 F.2d 983, 986 (2nd Cir. 1969); *United States* v. *Wallace*, 368 F.2d 537, 538 (4th Cir. 1966); *Burke* v. *United States*, 400 F.2d 866, 868 (5th Cir. 1968).[6] The one case said by the Third Circuit to be

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[6] But the Third Circuit has said that the Fifth Circuit's dictum in *Burke* was "impliedly rejected" in the later decision in *United States* v. *Marcello*, 423 F.2d 993 (5th Cir. 1970). See *Goodwin*, 440 F.2d at 1155, note 3.

squarely based on this distinction is *United States* v. *Rybicki*, 403 F.2d 599, 601-602 (6th Cir. 1968), which held that, for purposes of a non-assault interference with federal revenue agents in violation of 26 U.S.C. § 7212(a), the Government must prove that the defendant knew the agents were government officers performing official duties at the time of the alleged offense.

The Fourth Circuit, in the course of affirming an assault conviction under § 111, has also noted the existence of more than dicta in the "wide variance and lack of unanimity among the decisions as to whether *scienter* should be alleged and/or proved." *United States* v. *Chunn*, 347 F.2d 717, 721 (4th Cir. 1965).[7] From the decisional compilations of the Third and Fourth Circuits in *Goodwin* and *Chunn*, it would appear that the earlier balance among the Circuits was in favor of requiring scienter, at least in non-assault situations, whereas the more recent balance of decision has been opposite.

The difficulty encountered by the lower courts in determining whether scienter is necessary in non-as-

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[7] The Fourth Circuit in *Chunn* did not limit this acknowledgment of a conflict to non-assault cases, though in context it may be so read. The cases said by the Fourth Circuit to support the view that scienter must be proved are generally earlier than the similar cases cited by the Third Circuit in *Goodwin*. The Fourth Circuit's listing included:

Pettibone v. *United States*, 148 U.S. 197 (1893); *Portnoy* v. *United States*, 316 F.2d 486 (1st Cir. 1963); *Hall* v. *United States*, 235 F.2d 248 (5th Cir. 1956); *Carter* v. *United States*, 231 F.2d 232 (5th Cir. 1956); *Hargett* v. *United States*, 183 F.2d 859 (5th Cir. 1950); *Walker* v. *United States*, 90 F.2d 61 (6th Cir. 1937); *Chiaravalloti* v. *United States*, 60 F.2d 192 (7th Cir. 1932). Three district court decisions to the same effect were also cited.

The opposing view, that no scienter is required, was found in cited decision of the Second, Fifth and Sixth Circuits, plus one district court decision. *Chunn*, 347 F.2d at 721, note 13.

sault situations stems from the fact that Congress, in enacting § 111 and other similar statutes, has never specifically addressed itself to the need for proving knowledge as to the official status of the federal officer whose duties have been impinged. And some of the Circuits have been induced to sanction scienter by virtue of an early decision by this Court in *Pettibone* v. *United States*, 148 U.S. 197 (1893). *Pettibone* held that proof of knowledge is necessary under a statute (Rev. Stat. § 5399) proscribing the intimidation or impeding of any officer or witness in a federal court; proof had to be made that the defendant knew that justice was being administered in the federal court before any act of intimidation became punishable. A "specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability." 148 U.S. at 207. See also *Morissette* v. *United States*, 342 U.S. 246 (1952), holding that the mere omission of any mention of intent from a federal statute (18 U.S.C. § 641) punishing the stealth of federal property did not eliminate the need for proving an intent to steal. But there is no decision of this Court specifically dealing with the scienter requirement of § 111 or any similar federal statute. See *Ladner* v. *United States*, 358 U.S. 169 (1958).[8]

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[8] In *Ladner*, this Court held that a defendant who fired a shotgun once at three federal agents could be convicted of but one violation of § 111. The Court noted that the sparse legislative history of § 111 revealed an intent to protect federal officers from physical harm and "to further the legitimate purposes of the Federal government." 358 U.S. at 175. The Court's reference to a hypothetical instance of a violation of § 111, by means of locking a door "to prevent the entry of federal officers intending to arrest a person within," 358 U.S. at 176, impliedly imparts knowledge to the actor of the official status of the federal officers.

The confusion and conflict long evident among the Circuits make it appropriate to grant certiorari to determine, for the purposes of § 111, the necessity for alleging and proving the defendant's knowledge of the federal officer's status in situations involving a non-assault interference. The instant case provides a proper vehicle for resolving this conflict, involving as it does a non-assault interference in the nature of what was no more than a traffic violation. Had the person driving the unmarked car not been an F.B.I. agent or other federal officer, the act of slowing and crowding but not touching that car would not have constituted an assault or any other common law crime. The action became punishable only if the person in the car was a federal officer. In that situation, must Gimelstob have had knowledge that McChuan, the driver of the unmarked car, was an F.B.I. agent pursuing his duties?

3. The Third Circuit's decision raises an important and unresolved problem as to when foreign commerce is terminated.

The Third Circuit has here ruled that the tin was still in foreign commerce at the time it was stolen since the tin "was still being held by the shipper under the original bills of lading" and had not yet been picked up by the consignee. See p. 12a, *infra*.

This Court has not had occasion to determine the criteria for decision as to when foreign commerce has terminated.[9] But in determining the related problem as to when interstate commerce has ceased, this Court

[9] In *Wabash R. Co.* v. *Pearce*, 192 U.S. 179, 188 (1904), the Court held that "the importation of goods is a subject of national, and not of state, regulation, [and] that such power of regulation continues until the final delivery of the imported articles."

has consistently held that interstate transit terminates when the goods have been delivered to the consignee at the place to which they were consigned. *Rhodes* v. *Iowa*, 170 U.S. 412 (1898); *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438 (1898); *Illinois C.R. Co.* v. *De Fuentes*, 236 U.S. 157 (1915); *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1918). Formalities, such as the transfer of title and contents of the bills of lading, may be relevant but are not considered decisive in determining whether interstate movement has ceased. See *Minnesota* v. *Blasius*, 290 U.S. 1, 10 (1933).

Here, the Third Circuit's preoccupation with the original bills of lading in determining whether the tin was still moving in foreign commerce would appear to be misplaced.[10] The few other lower courts that have dealt with the problem have emphasized, consistently with the interstate commerce precedents, that a "foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered" to the ultimate consignee. See *United States* v. *Yoppolo*, 435 F.2d 625, 626, (6th Cir. 1970); *O'Kelly* v. *United States*, 116 F.2d 966 (8th Cir. 1941); *United States* v. *Concepcion*, 419 F.2d 1261 (2nd Cir. 1970).

In the instant case, application of the "delivery to the ultimate consignee" test would compel the conclusion that the tin had terminated its foreign journey when it was stolen. The only and hence ultimate con-

[10] Query whether the issue of foreign commerce should have been submitted to the jury. The Third Circuit did not discuss that matter and did not rase its decision on the jury's verdict in this respect. The instruction to the jury contained little in the way of meaningful criteria to assess when foreign commerce was terminated in this case. See pp. 12-13, *supra*.

signee, Phillips Brothers, had received and warehoused the tin. The consignee was free to dispose of the tin at its pleasure and direction, there being no proof of any preexisting contracts to transfer any of the tin to other consignees. The foreign shipment had come finally to rest in the I.T.O. warehouse and was there broken and weighed by the consignee's agent.

The problem of determining when a foreign shipment has terminated is appropriate for review purposes, particularly since it arises in the context of a criminal statute making a man's liberty dependent on a proper evaluation of the foreign commerce concept.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1622 to 72-1625

UNITED STATES OF AMERICA, *Appellee*,

v.

HERBERT MARTIN GIMELSTOB, JOSEPH TREMARCO, RICHARD MICLIZ, VICTOR FRIEDLANDER, LEONARD SHERMAN, IRA ZUCKERMAN, EMANUEL ZUCKERMAN, HARRY E. BOGIN and MORRIS SIEGEL

VICTOR FRIEDLANDER	72-1622
LEONARD SHERMAN	72-1623
JOSEPH TREMARCO	72-1624
HERBERT MARTIN GIMELSTOB,	72-1625

Appellants.

Appeal From the United States District Court for the District of New Jersey

Argued December 7, 1972

Before VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

Opinion of the Court

(Filed Feb. 21, 1973)

HUNTER, *Circuit Judge:*

The central element in this case was a conspiracy to steal certain tin ingots from a warehouse in Port Newark, New Jersey, in violation of 18 U.S.C. § 659.

There were four counts to an indictment which named appellants and other defendants not relevant to this case. The charges relating to appellants are as follows: all four appellants were charged with violating 18 U.S.C. § 659 by conspiring to take, steal, and carry away goods in foreign commerce with the intent to convert these goods to their own use (Count I). They were also charged with violating § 659 by possessing goods which they knew to be stolen (Count III).[1] Appellants Gimelstob and Tremarco alone were charged with assaulting, opposing, impeding and interfering with an FBI agent in violation of 18 U.S.C. § 111 (Count IV). After the district court granted appellant Gimelstob's motion for a judgment of acquittal as to the first violation of § 659, a jury found all appellants guilty as charged. Appellants present a plethora of purported errors, none of which require reversal. Having rejected them en masse, we will proceed to reject them *seriatim*. Facts will be developed when necessary.

I. The Seizure of the Stolen Tin

All four appellants contend that the FBI's seizure of the stolen tin was improper because the affidavit supporting the search warrant was legally insufficient. The warrant in question met the standards set out by the Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1968). *Aguilar* set up a two-pronged test to determine the sufficiency of a warrant which is based on tips from a confidential informer: (1) the warrant must show that the informer is credible, and (2) some of the underlying circumstances giving rise to the informer's conclusions must be present. In this case, the warrant alleged that the informer relied upon had previously disclosed information leading to at least five convictions; and FBI surveillance provided sufficient corroboration for the informer's conclusion. See *Spinelli* v. *United*

[1] Count II named a defendant not involved in this appeal .

States, supra at 417-18. *United States ex rel. Henderson* v. *Mazurkiewicz*, 443 F.2d 1135 (3d Cir. 1971); *United States* v. *Singleton*, 439 F.2d 381 (3d Cir. 1971); *United States ex rel. Kislin* v. *State of New Jersey*, 429 F.2d 950 (3d Cir. 1970). Only a probability of criminal activity is necessary for there to be probable cause, *see, e.g., Spinelli* v. *United States, supra* at 419, and here the affidavit for the search warrant showed such a probability.

II. Improper Joinder

Appellants Sherman and Friedlander argue that it was improper under Rule 8 of the Federal Rules of Criminal Procedure to join the charges against appellants Tremarco and Gimelstob for assaulting an FBI agent with the charges against them on the conspiracy counts. In the alternative, they argue that if joinder was permissible, a severance under Rule 14, Fed. R. Crim. Proc., should have been granted. There is no merit in these arguments. The assault on the FBI agent was clearly related to the conspiracy charges, and Rule 8(b), Fed. R. Crim. Proc., does not require that each defendant be named in each count, so long as the offenses are related. See 8 *Moore's Federal Practice*, § 8.06[2] (Cipes ed. 1972). *1 Wright, Federal Practice and Procedure*, § 144 (1969).

Nor was it improper for the district court to deny appellants' motion for severance under Rule 14. This motion is addressed to the discretion of the trial court, and appellants have not demonstrated the type of prejudice necessary for us to say that the district court abused its discretion. *See 8 Moore's Federal Practice, supra* § 14.02[1]. *1 Wright, Federal Practice and Procedure, supra* § 227.

III. Testimony of Threats to a Witness

A government witness who had been involved in the conspiracy testified that he had been threatened with harm by appellant Friedlander if he were to talk. The witness

testified that Friedlander did not state the exact nature of the harm that would occur, but that the witness understood, from previous conversations with Friedlander, that Friedlander meant that he would be killed. In fact, an attempt was made on the life of the witness, allegedly by appellant Tremarco. However, this attempt was not disclosed to the jury.

Appellants Friedlander, Sherman, and Tremarco agree that testimony of the threat itself was properly admitted, but contend that the district court should not have allowed the witness to explain the nature of the harm that would come to him. On the basis of this testimony and an aborted question,[2] they further argue that the jury was able to infer that the attempt on the life of the witness had been made. They present no authority for this argument.

There is no merit in the contention. The statements as to the kind of harm were relevant to the precise nature of the threats and also tended to establish Friedlander's guilt. This testimony plus the unfinished question do not lead to the inference that appellants claim that the jury made. Additionally, at that time the district court instructed the jury to disregard the fragment of the question asked and in his jury charge gave a general instruction for them to disregard everything he had previously excluded.

IV. Admissibility of a Card Seized From Tremarco

FBI agents seized a card from appellant Tremarco's wallet upon his arrest. This card contained various phone numbers, including two unlisted numbers of appellant Gimelstob. Tremarco now claims that this card was improperly seized because the government failed to estab-

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[2] The jury heard this sentence fragment:

"Did there come a time when Victor Friedlander's warning to you on August 31st . . ." Appendix, 1805-1806.

lish that at the time of its seizure there was a probability that it could be evidence leading to a conviction or an apprehension of others. *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967).

Admission of the card was not error. It was logical for the FBI to believe that the phone numbers on the card could disclose further participants in the conspiracy or show a connection between Tremarco and the other defendants. And furthermore, this argument seems "much ado about nothing" since the card is of absolute minimal importance. Its lack of significance combined with the weight of the government's evidence leads us to the conclusion that any error in its admission would clearly be harmless beyond a reasonable doubt under the Supreme Court's test in *Milton* v. *Wainwright*, 40 U.S.L.W. 4782 (U.S. June 22, 1972); *Harrington* v. *California*, 395 U.S. 250 (1969); and *Chapman* v. *California*, 386 U.S. 18 (1967).

V. "Mug Shot" of Tremarco

Appellant Tremarco contends that it was improper for the district court to allow a "mug shot" (screened to hide identifying marks) into evidence against him. He claims that this impermissibly placed his prior criminal record before the jury. He relies on *Barnes* v. *United States*, 365 F.2d 509 (D.C. Cir. 1966), but that case is distinguishable from his.[3] Our task is to decide whether the district court properly determined that the probative value of the mug shot outweighed whatever prejudicial effects that it had. *E.g.*, *Hines* v. *United States*, Docket No. 72-1312 (3d Cir. November 28, 1972).

In *Barnes*, there was an in-court identification. No mention of a photographic identification was made on direct examination. Defense counsel chose not to argue to the

[3] We have, of course, not yet adopted *Barnes* v. *United States*, 365 F.2d 509 (D.C. Cir. 1966), in this circuit.

court that the identification procedures violated *Simmons* v. *United States*, 390 U.S. 377, 384 (1969), but, instead, he cross-examined the witness concerning a pretrial photographic identification. While "photographs" were mentioned freely, there was no description of them as "mug shots."

On redirect examination, the government attorney introduced into evidence two photographs of Barnes which the witness had viewed. While one was a normal snapshot, another was a mug shot. There was tape over the prison numbers on the photograph, and the trial judge emphasized that it covered something detrimental by commenting to the jury that he feared that one of them might inadvertently remove it and see the markings. The court held that the introduction of this "mug shot" improperly placed the defendant's prior criminal record before the jury even though it was the defense who had first brought out the photographic identification. The court emphasized that the prosecutor could have buttressed the testimony of his witness on redirect examination by introducing solely the snapshot and thus avoiding the prejudice inherent in introducing the mug shot. Furthermore it does not appear that the defense inquiry in *Barnes* focused on the appearance of the appellant in pictures which the witness was shown. It instead concentrated on the fact that the identifying witness had been shown only pictures of appellant.

There are similarities to *Barnes* in this case. An FBI agent made an in-court identification of appellant on direct examination, and no mention of photographs was made. He testified that he had seen appellant near the garage to which the stolen tin had been transported. There was no attempt to suppress the agent's identification, and on cross examination the defense attorney brought out the fact that the witness had made a previous photographic identification of appellant. The attorney was particularly concerned with how appellant was dressed, both at the time he was seen by the agent and in the photograph that was shown

to the agent. He was attempting to prove that the agent had identified appellant only because appellant had a white tee shirt on in his picture and because the man the agent had seen at the garage also had a white tee shirt on. The following line of questioning occurred:

"Q. In this photograph was he wearing a white undershirt?

"A. No sir, not that I recall.

"Q. Do you remember what he was wearing in the photograph?

"A. As I recall it was a facial photograph. It was not a photograph of an entire person.

"Q. Did it have his shoulders showing?

"A. Not that I recall, no, sir.

"Q. Just from the chin up, the neck?

"A. No, from the chest area. It was a *mugtype photograph*. [Emphasis added].

"Q. Yes, so that from the chest up you would see his shoulders?

"A. Yes, sir.

"Q. And if he wore a white undershirt that would be shown clearly in the photograph, would it not?

"A. Yes, sir.

"Q. Because the shoulders would be bare, is that right?

"A. Yes, sir.

"Q. Do you recall whether he had a white undershirt on in that photograph?

"A. No, sir, I don't." (Appendix, 1237, 1238).

On redirect, the government was allowed to introduce the photograph of appellant into evidence. Although the masking of the identification marks was much less obtrusive in this case than it was in *Barnes* and the district court judge's handling of the photographs much less prejudicial, there are other more significant differences between the cases.

The fact that the photograph viewed was a "mug-type" photograph was already before the jury in response to defense questioning. Since what was shown to the jury was a mug-type photograph, i.e., there were no prison numbers or other marks present, the jury knew no more than they had before as a result of the defense questioning. They already had been alerted by appellant that he had either been in trouble with the police or had had a prison record. Additionally, appellant's attorney had left with the jury the agent's statement that he was unsure how appellant had been dressed in the photograph. It was proper for the agent to show the jury that appellant had not been dressed in a tee shirt in the picture. *United States* v. *Quinn*, 454 F.2d 29, 37 (5th Cir. 1972). The government attorney did not have the ready alternative available to him that the government attorney had available in *Barnes*. The probative value of the picture here outweighed whatever prejudicial effects, if any, the introduction of the photograph involved. *See Hines* v. *United States*, *supra*; *United States* v. *Frascone*, 299 F.2d 824, 828, 829 (2d Cir. 1962).

VI. Summation By United States Attorney

Appellants Friedlander and Tremarco contend that certain remarks[4] on summation by the government attorney amounted to an unconstitutional comment on their failure to take the witness stand in violation of *Griffen* v. *California*, 380 U.S. 609 (1965). After having examined the prosecutor's statement and the defense summation argument which prompted it, we conclude that his comment

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[4] The government attorney stated:

"I have searched the record. If there is any question, ask the Judge to read it to you. At no time Harry Bogin was on that stand that Mr. Querques or any of the other defense counsel saw fit to cross-examine him on the threats. At no time. Those threats stand before you uncontroverted, unquestioned except in summation." Appendix, pg. 3469.

cannot reasonably be so construed. *See, e.g., United States* v. *Guiliano*, 383 F.2d 30 (3d Cir. 1967); *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). He very briefly addressed himself solely to the failure of appellant's counsel to cross-examine a government witness on a certain issue. This and the fact that the government attorney's remark was prompted by an attack on his witness's credibility by defense counsel in summation both serve to distinguish this present case from the First Circuit's decisions in *United States* v. *Flannery*, 451 F.2d 880 (1st Cir. 1971) and *Desmond* v. *United States*, 345 F.2d 225 (1st Cir. 1965). *See United States* v. *Guiliano*, *supra* at 35.

VII. Jury Charge As To Possession and Guilty Knowledge

Appellants Tremarco and Gimelstob contend that the district court erred in its charge to the jury on the issue of constructive possession relevant to Count III of the indictment which charged appellants with possession of property stolen from interstate commerce. After having examined the charge of the court in its entirety, we are convinced that there was no error.

Tremarco and Gimelstob also argue that there was insufficient evidence to convict them on this count. Since there was sufficient evidence to convict them under 18 U.S.C. § 2 as aiding and abetting an offense we do not have to consider this claim. *See Long* v. *United States*, 360 F.2d 829, 835 (D.C. Cir. 1966) (Burger, J.); *United States* v. *Mineri*, 303 F.2d 550, 557 (2d Cir. 1962).

VIII. Jury Charge As To 18 U.S.C. § 111

Appellants Tremarco and Gimelstob claim that the district court was incorrect to refuse to charge that under 18 U.S.C. § 111, it is necessary for the actor to know that the person interfered with was a federal officer.

We have held that such knowledge is not necessary for a person to be convicted under § 111. *United States* v. *Goodwin*, 440 F.2d 1152 (3d Cir. 1971). *Accord, e.g., United States* v. *Vlau*, 421 F.2d 787 (2d Cir. 1970); *United States* v. *McGough*, 410 F.2d 458 (4th Cir. 1969); *United States* v. *Marcello*, 423 F.2d 993, 1010 (5th Cir.), *cert. denied*, 398 U.S. 959, 90 S.Ct. 2172, 26 L.Ed.2d 543 (1970); *United States* v. *Leach*, 429 F.2d 956, 959 (8th Cir. 1970); *United States* v. *Kartman*, 417 F.2d 893 (9th Cir. 1969).

Appellant Gimelstob also argues that the district court defined assault incorrectly in its charge. However, we do not have to consider that question since there was ample evidence that the agent in this case was forcibly opposed, impeded, and interfered with. Therefore the conviction must be affirmed since "the general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner* v. *United States*, 398 U.S. 398, 420 (1970).

IX. Effect of Gimelstob's Acquittal

The district court granted appellant Gimelstob's motion for a judgment of acquittal as to the charge that he had conspired to steal, take, or carry away tin from foreign commerce. Gimelstob now argues that the jury should have been instructed of this fact since otherwise it would use evidence on that ground against appellant when it considered the other charges against him. He also contends that the district court should have marshalled and segregated the evidence as to him in its charge.

This circuit had held that it is necessary to object at trial to the district court's failure to marshall evidence against an appellant. *United States* v. *Kenny*, 462 F.2d 1205, 1228, 1229 (3d Cir. 1972). *Accord, United States* v. *Armone*, 363 F.2d 385 (2d Cir. 1966). Since appellant did

not object at trial, he cannot raise this argument in the absence of plain error. Rule 52(b), Fed. R. Crim. Proc. Under the circumstances of this case, we do not think that such error, if any, existed. *Compare United States* v. *Kelly*, 349 F.2d 720, 758, 759 (2d Cir. 1965).

The district court instructed the jury that Gimelstob had been severed (instead of acquitted) as to Count I. Appellant's contention that instead it should have said he was acquitted is unsupported by legal authority, and we dismiss it.

X. Jury Charge as to Credibility of Witness

All appellants except Gimelstob contend that the district court's jury charge was unfair because it had the effect of taking away appellants' presumption of innocence. After examining the district court's charge as a whole, we can state that it was eminently fair. Its charge was not at all similar to the one in *United States* v. *Garza*, 426 F.2d 949, 954 (5th Cir. 1970) upon which appellants rely.

XI. Sufficiency of Evidence

Appellants Friedlander, Sherman and Tremarco contend that the government did not prove that they were part of a conspiracy to carry away tin from foreign commerce, as charged in Count I of the indictment. Apparently, they argue that since the government did not demonstrate that they actually participated in the physical removal of the tin, they could not be proven guilty.

Viewing the evidence in a light most favorable to the government, we are convinced that it did establish that appellants were part of a continuing conspiracy to carry away and distribute the tin. *See United States* v. *McGann*, 431 F.2d 1104 (5th Cir. 1970), *cert. denied* 401 U.S. 919 (1971); *Nassif* v. *United States*, 370 F.2d 147 (7th Cir. 1966). While once a conspiracy has been established only slight evidence is necessary to support a jury verdict that

an individual defendant was a member, *see, e.g., United States* v. *Kenny, supra* at 1226, there was a great deal of evidence to support the involvement of appellants in this case.

XII. Foreign Commerce

All of the appellants contend that the government did not establish that the tin was in foreign commerce at the time it was stolen. This contention also must fall. On this issue, each case must be evaluated on its own particular facts. In reaching a determination on whether an item is still within foreign commerce at a given time, one must examine the relationship between the consignee, the consignor, the carrier, the indicia of foreign commerce at the time of the theft and the congressional intent. *See United States* v. *Cousins*, 427 F.2d 382, 385 (9th Cir. 1970); *United States* v. *Maddox*, 394 F.2d 297 (4th Cir. 1968). The evidence showed that although the tin had reached port and been unloaded to a warehouse, it was still being held by the shipper under the original bills of lading. "An interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered." *United States* v. *Yoppolo*, 435 F.2d 625, 626 (6th Cir. 1970). Here, where the tin had not yet been picked up and was still being held by the shipper under its original bills of lading, delivery had not yet occurred.

Appellants Friedlander and Sherman also argue that the district court's charge on this point was incorrect. This contention is also without merit.

The judgment of the district court will be affirmed.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the District Court, filed in cases Nos. 72-1622, 72-1623 and 72-1624 on June 9, 1972 and in case No. 72-1625 on June 7, 1972 be, and the same are hereby affirmed.

ATTEST:
THOMAS F. QUINN
Clerk

February 21, 1973

Sur Petition for Rehearing

Present. SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges*

The petition for rehearing filed by HERBERT MARTIN GIMELSTOB, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III
Judge James Hunter, III

Dated: April 4, 1973

Judge Weis did not participate in this matter.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1618

HERBERT MARTIN GIMELSTOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 475 F. 2d 157.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1973. A petition for rehearing was denied on April 4, 1973. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 2, 1973. The petition was filed on June 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether proof of *scienter* is required for the offense of impeding a federal officer engaged in the performance of his official duties (18 U.S.C. 111).

2. Whether the government failed to prove that the stolen property was moving in foreign commerce at the time of the theft.

3. Whether the district court erred in instructing the jury with respect to petitioner's acquittal on the conspiracy count.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of the knowing possession of 220,000 pounds of tin ingots stolen from foreign commerce, in violation of 18 U.S.C. 659, and of interference with a federal officer engaged in the performance of his duties, in violation of 18 U.S.C. 111. At the close of the evidence, petitioner was acquitted by the court of a third charge of having conspired to commit the theft, in violation of 18 U.S.C. 371.[1] Petitioner was sentenced to consecutive prison terms totaling seven and one-half years, and fines totaling $10,000. The court of appeals affirmed (Pet. App. 1a–12a; 475 F. 2d 157).

On August 22, 1970, approximately 270,000 pounds of tin ingots, valued at $400,000, arrived at Newark, New Jersey after having been shipped from Thailand

[1] Nine defendants were originally named in the indictment. One was a fugitive at the time of the trial; three pleaded guilty; one was acquitted at the close of the government's case; and three were tried with petitioner and convicted as charged.

(Tr. 1493–1494). Within two days, the tin had been unloaded and stored in an International Terminal Operators (I.T.O.) warehouse in Newark by an agent for Phillips Brothers, the importer and holder of the bills of lading (Tr. 382–392, 2734). On August 26 and 27, Phillips Brothers issued delivery orders authorizing its customers to pick up their tin purchases from the I.T.O. warehouse, and some of the shipment was delivered to customers pursuant to these orders (Tr. 289–294, 2742–2746).

On August 28, 1970, one Mieliz (a fugitive co-defendant in the case) and three other persons illegally removed the remaining tin from the warehouse and loaded it into trucks which they had leased previously (Tr. 412, 523, 530, 578, 603–608). The trailers containing the stolen ingots were unloaded during the evening and the next morning in a garage in a residential area of Newark (Tr. 605–606, 688–692).

On August 31, three of the co-defendants, Sherman, Friedlander, and Bogin, who testified as a government witness, arranged for the sale of the tin to co-defendants Ira and Emanuel Zuckerman (Tr. 1753–1755). Bogin and Sherman were to pick up the tin (Tr. 1755–1756). They and Friedlander drove two vans to petitioner's store in Newark. Bogin waited with the trucks, while the other two went inside the store. Shortly thereafter, they emerged with two other men, who got into the trucks and drove off (Tr. 1757–1761). Bogin waited across the street from petitioner's store for the vans to return with the tin, while Friedlander and Sherman re-entered petitioner's store.

Friedlander, Sherman, and petitioner went in and out of the store together several times while Bogin waited (Tr. 1763, 1785).

As these events took place, the garage containing the ingots was under FBI surveillance, as the result of information from a confidential informant (Tr. 1367–1369). At about 11:15 a.m., two vans arrived at the garage; and at the same time, co-defendant Tremarco drove up in an automobile and entered the garage. The two trucks were loaded and driven off, and Tremarco returned to his automobile (Tr. 1140–1143).

Special Agent Robert McCluan commenced surveillance of the vehicles and proceeded to follow Bogin's van on its circuitous route, travelling at about 35 to 40 miles per hour (Tr. 796–801). Eventually, the van passed the place where Bogin was waiting for it and slowed down. Bogin went out from the curb to meet the truck, but it continued past him, the driver honking the horn vigorously. Bogin saw a car (McCluan's) following the van closely (Tr. 1786–1790). At the same time, McCluan saw petitioner standing nearby, next to a green Lincoln sedan. As the van slowed down, petitioner looked at the van and then at McCluan, and got into the Lincoln (Tr. 802). Bogin looked across the street and observed that petitioner was no longer standing with Sherman and Friedlander, who were looking down the street in the direction which the truck had taken.

As agent McCluan continued to follow the van, petitioner, in the Lincoln, suddenly darted around the corner, directly into McCluan's path, and slammed on his brakes. Almost immediately, co-defendant Tre-

marco drove up on McCluan's left side, completely boxing him in and preventing him from following the truck (Tr. 802–804). Petitioner brought the Lincoln in front of McCluan's automobile and drove slowly down the street "popping" his brakes, so that McCluan was forced to brake continuously. Tremarco stayed at McCluan's left so that the agent's vehicle could not be maneuvered around the Lincoln. McCluan observed a radio microphone in petitioner's hand, close to his mouth, and a citizen's band antenna on the Lincoln. Eventually, petitioner drove off quickly down the street (Tr. 808–809, 892–893).[3] Friedlander then crossed the street and asked Begin whether he had seen "them take out the FBI car," explaining that the honking of the horn was a "prearranged signal" (Tr. 1789–1791, 1799).

Petitioner was named in three counts of the indictment. Count I charged the nine defendants with conspiracy to steal property, in violation of 18 U.S.C. 371. Count III charged the same nine persons with the knowing possession of property stolen from foreign commerce, in violation of 18 U.S.C. 659. In Count IV, petitioner and Tremarco were charged with assaulting, opposing, impeding, and interfering with Agent McCluan in the performance of his official duties, in violation of 18 U.S.C. 111.[4] As we have al-

[3] Count II charged the fugitive defendant Micliz with the theft of the tin.

[4] When Tremarco was apprehended, shortly thereafter, he was discovered also to have a radio transmitter and receiver in his automobile (Tr. 900).

ready noted, petitioner was acquitted of Count I by the court at the close of all the evidence. Counts III and IV were submitted to the jury with the instruction that petitioner had been "severed" as to the conspiracy count (Tr. 3556). The court's instructions included a detailed explanation of the elements of constructive possession (Tr. 3578–3580) and aiding and abetting (Tr. 3584–3585).

ARGUMENT

1. Petitioner contends that the courts below erred in holding that *scienter* is not an essential element of proof under 18 U.S.C. 111. While conceding that the Third Circuit, in holding that no *scienter* is required, follows the majority rule, petitioner argues that the better view would sustain a criminal conviction only upon proof that the defendant was aware that his victim was a federal officer engaged in the performance of his official duties.

Petitioner cites a number of cases which purportedly establish a conflict among the circuits with respect to the *scienter* requirement (*e.g.*, Pet. 22). However, a review of recent decisions reveals that every circuit which has considered the issue involved in the instant case holds that *scienter* is irrelevant in the indictment and in the proof at trial. *United States* v. *Maynard*, 452 F. 2d 1087 (C.A. 1); *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F. 2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), cer-

tiorari denied, 404 U.S. 915; *United States* v. *Gaunt*, 436 F. 2d 364 (C.A. 7); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8), certiorari denied, 402 U.S. 986 (dictum); *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9).

No circuit presently holds that *scienter* is invariably an element of 18 U.S.C. 111. In *United States* v. *Rybicki*, 403 F. 2d 599, the Sixth Circuit did rule that *scienter* is material in certain situations where the defendant's conduct is apparently a reasonable response to the acts of the unidentified officer. In that case the defendant threatened IRS officers who were in the process of seizing his truck. Other courts have suggested in dictum that in cases of that nature, and where the charge is resisting arrest, knowledge that the officer is a law enforcement officer (although not necessarily that he is a *federal* officer) may be material. *United States* v. *Clan*, *supra*, 421 F. 2d at 789–790; *United States* v. *McKenzie*, 409 F. 2d 983, 986 (C.A. 2); *United States* v. *Wallace*, *supra*, 368 F. 2d at 338. In all such cases, however, *scienter* is integrally related to the issue of *mens rea*, since the defendant in some circumstances may reasonably believe his use of force to be justified to protect persons or property if he is unaware of his victim's official authority and purpose. Accordingly, the Sixth Circuit applies the principle of *Rybicki* only upon a showing of "special facts." *United States* v. *Kiraly*, *supra*, 445 F. 2d at 292.

Petitioner's deliberate obstruction of Agent McCluan's automobile was entirely unprovoked and petitioner offers no possible justification for his inter-

ference with the agent's surveillance of the van. It is therefore clear that the instant case does not fall within the rationale of *Rybicki*. Since the circuits are in accord that, on facts such as those presented here, scienter is not an element of an offense under 18 U.S.C. 111, there is no occasion for further review.

2. Petitioner argues that the court of appeals erred in finding that the stolen tin ingots were moving in foreign commerce at the time of the theft. As we detailed in our statement of facts, the ingots were stolen from the warehouse where they had been stored by an agent for the consignee, Phillips Brothers, under the original bills of lading. Contrary to petitioner's claim, it was not contemplated that the named consignee would accept delivery of the entire load; rather, it was intended that Phillips Brothers would issue delivery orders on behalf of its customers, who would then take delivery of portions of the shipment (Tr. 1497, 1518–1523). Indeed, some of the ingots had been called for pursuant to such delivery orders prior to the time of the theft.

It is settled that goods moving in interstate or foreign commerce are subject to federal regulation until their "final delivery." *Wabash R.R. Co.* v. *Pearce*, 152 U.S. 179, 188. The only question is when "final delivery" is made, and the answer obviously depends on the particular facts of each case. Petitioner contends that the test is delivery to the ultimate consignee (Pet. 25), and by inference argues that Phillips Brothers was the ultimate consignee of the tin ingots and that delivery was effected when the ingots were warehoused. But the fact that Phillips Brothers was listed on the bill of lading as the consignee is not controlling. That is

illustrated by *United States* v. *Yoppolo*, 435 F. 2d 625 (C.A. 6), which presents facts quite similar to those in the instant case. There the whiskey had been shipped on a bill of lading listing the United States distributor of the liquor as the consignee. The liquor was warehoused pending delivery to the ultimate consignees for whom the liquor had been imported. The liquor was thereafter stolen during an intrastate shipment from the warehouse to the distributor's intended consignee. The Sixth Circuit nevertheless, upheld a conviction for theft of liquor from foreign commerce. See also *United States* v. *Maddox*, 394 F. 2d 297 (C.A. 4).

Similarly, here the jury could find that, until the authorized customers of Phillips Brothers presented their delivery orders and accepted the portions of the shipment which were assigned to them, the goods remained in foreign commerce. *Illinois Central R.R.* v. *Louisiana R.R. Comm.*, 236 U.S. 157, 163; *Rhodes* v. *Iowa*, 170 U.S. 412, 419, 426. See *Vance* v. *W. A. Vandercook Co.*, 170 U.S. 438, 444–445; *Brown* v. *Maryland*, 12 Wheat. 419, 447–448.[1]

3. Petitioner alleges that the district court erred in advising the jury that petitioner had been "severed" as to the conspiracy count of the indictment, and that

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[1] *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8), has no application here. In that case, delivery was final and complete prior to the theft, since the ultimate consignee had accepted the goods and exercised exclusive dominion over them prior to the theft.

[2] As the court of appeals noted (Pet. App. 12a) and petitioner implicitly recognizes (Pet. 24–26), the issue whether the tin

the court's instruction in this regard improperly permitted the jury to consider conspiracy evidence in convicting petitioner on the substantive counts. At the close of the evidence, petitioner was acquitted by the district court of conspiracy to steal the tin ingots (Tr. 3250). Petitioner's counsel requested that the jury be advised of the acquittal, but the court refused, viewing such an instruction as improper and prejudicial and ruling that "severance" was the proper term (Tr. 3260–3264). The district judge also declined to instruct the jury to disregard certain evidence which was admitted against petitioner with respect to the conspiracy, since the evidence was relevant to the substantive counts as well (Tr. 3264–3265). Petitioner's counsel did not object to this ruling. Nor, following delivery of the charge (see Tr. 3556, 3572), did petitioner's attorney complain that the court had failed to marshall the evidence which might properly have been used against petitioner (Tr. 3592–3595).

Nevertheless, petitioner now asserts that the court's instruction [7] was ambiguous and permitted the jury to

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was moving in commerce at the time of the theft is a question of fact, not a matter of law. Accordingly, the trial judge presented the issue to the jury, with explicit instructions to determine whether the goods were part of a foreign shipment. The jury was charged that an affirmative finding on this issue was essential to a verdict of guilt (Tr. 3574–3577). The jury's verdict thus manifests a finding of fact that the tin ingots were moving in foreign commerce at the time of the theft. That determination is supported by the evidence, and is therefore controlling on appeal. *Glasser* v. *United States*, 315 U.S. 60, 80.

[7] "The defendant Gimelstob has been severed as to Count 1. You are not to speculate upon or draw any inference with re-

consider, as relevant to the substantive counts, evidence adduced against petitioner *and* his conspirators on the conspiracy count. But, a fair reading of the charge (Tr. 3572) does not support the inference that the court allowed the jury to evaluate any evidence against the co-defendants in deciding petitioner's guilt on the substantive charges. With respect to conspiracy evidence adduced against petitioner, the district judge had previously made clear his position that the evidence introduced against petitioner was equally applicable to both the conspiracy and substantive counts (Tr. 3264–3265). The proof of petitioner's association with the criminal venture (*e.g.*, Tr. 1785–1799) was highly relevant to the jury's determination of whether petitioner was in constructive possession of the stolen tin, or whether he had aided and abetted in that possession. Petitioner has made no showing that any evidence introduced against him at trial was inadmissible for the purpose of proving the substantive counts of the indictment. Likewise, he makes no specific showing of possible instances of the improper use against him of conspiracy evidence introduced in relation to his co-defendants. In the absence of any showing of prejudice, the contention merits no further review.

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spect to that severance. By reason of that serverance you are not to render any verdict as to the defendant Gimelstob with respect to Count 1 [Tr. 3556]."

* * * * * * *

"As you recall, Mr. Gimelstob has been severed as to Count I. Any evidence adduced as to Gimelstob with respect to the charges contained in Count I is not to be considered by you as against Mr. Friedlander, Mr. Sherman and Mr. Tremarco

Petitioner relies mistakenly upon such cases as *Schaffer* v. *United States*, 362 U.S. 511; *United States* v. *Kelly*, 349 F. 2d 720 (C.A. 2); and *United States* v. *Patrisso*, 262 F. 2d 194 (C.A. 2). *Schaffer* and *Patrisso* both involved the introduction of conspiracy evidence against co-defendants which clearly might have been considered by the jury with regard to the complaining defendant, who had been acquitted of conspiracy. In *Patrisso*, the Second Circuit concluded that a scanty case against the complaining defendant had been bolstered by an "accumulation of instances during the trial in which testimony inadmissible against [him] was received against others with instructions that it was not to be considered as to [him]." This was prejudicial, particularly because much of the inadmissible evidence implicated no one other than the complaining defendant. *United States* v. *Patrisso*, *supra*, 262 F. 2d at 196–197.* But that is not this case. Here the evidence showing that petitioner aided and abetted others in the possession of the stolen goods was compelling. Indeed, there was no other reasonable explanation for petitioner's con-

in connection with the charges against them under Count I. Obviously, such evidence may not be considered as against Gimelstob, either, as to Count I, for he has been severed. However, you may consider evidence that has been adduced as against Gimelstob with respect to the charges against him contained in Counts III and IV * * * [Tr. 3572]."

*United States v. Kelly, *supra*, is wholly inapposite here, since in that case the defendant had been convicted of conspiracy on "tenuous and unsubstantial" proof, largely because the charge to the jury implied that if any defendant were convicted of conspiracy all must be. *United States* v. *Kelly*, *supra*, 349 F. 2d at 756.

duct in interfering with the F.B.I. agent. Any error in the charge on this point would, therefore, be harmless.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
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JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys.

AUGUST 1973.

[7] Petitioner also asserts that the district court erred in advising the jury that he had been "severed," rather than acquitted, of conspiracy. As the court of appeals noted, this contention is "unsupported by legal authority" (Pet. App. 11a).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1618

HERBERT MARTIN GIMELSTOB, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY MEMORANDUM

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September 25, 1973

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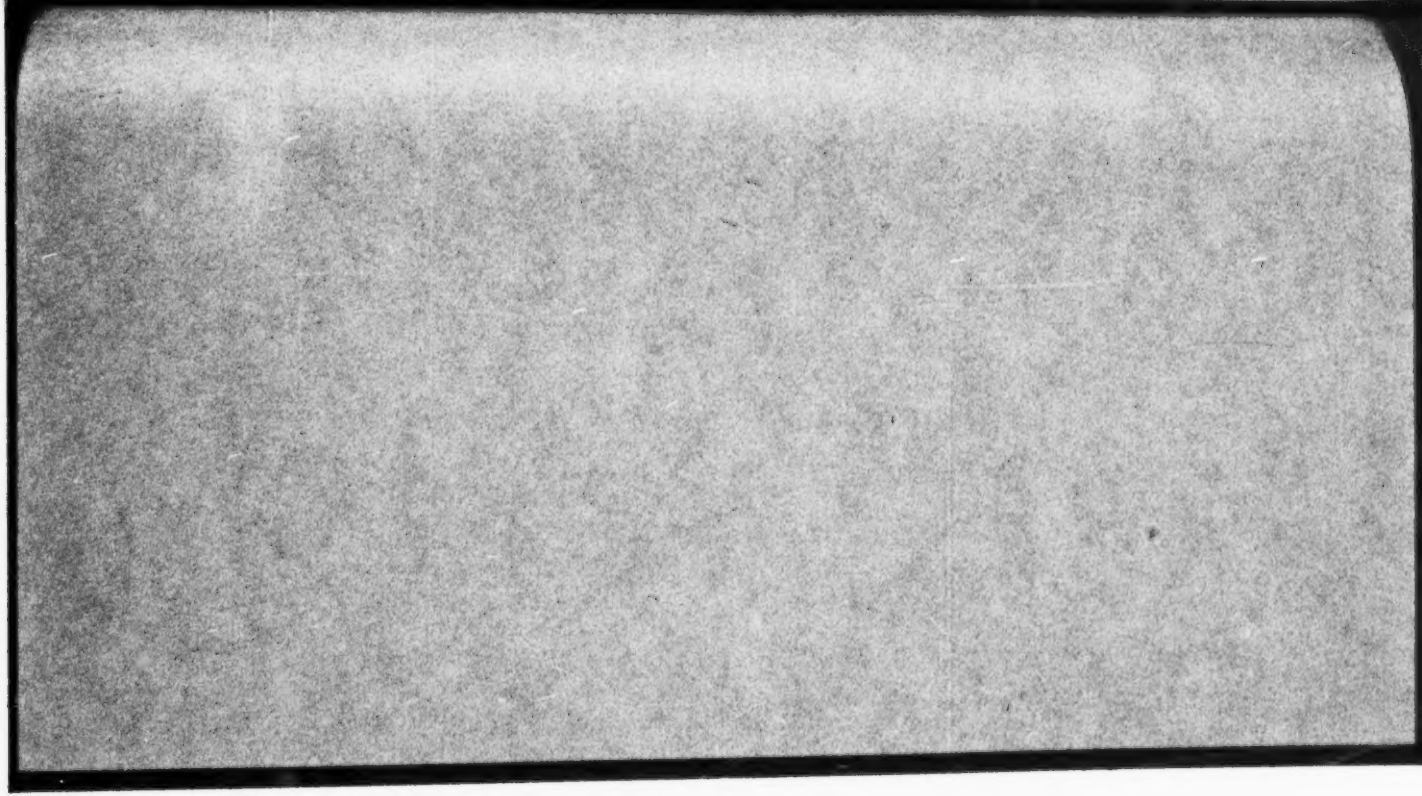

IN THE

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PETITIONER'S REPLY MEMORANDUM

In response to the Government's Brief in Opposition, the petitioner states as follows:

1. The Government acknowledges (Opp. Br. 7) that a conflict exists as to whether scienter is an essential element of proof under 18 U. S. C. §111, which penalizes one who "forcibly assaults, resists, opposes,

impedes, intimidates, or interferes with" federal officers engaged in performing official duties. But the Government asserts that the conflict arises only as to cases involving "special facts" where a defendant's resistance to arrest is a seemingly reasonable response to the acts of an unidentified officer.

The conflict cannot be that narrowly defined. The very case said by the Government to reveal the narrowness of the conflict, *United States* v. *Rybicki*, 403 F. 2d 599 (6th Cir. 1968), actually draws the line of conflict at those cases that do not involve offenses that "would have been crimes regardless of the person against whom they were committed." 403 F. 2d at 601-602. In other words, scienter is required by some Circuits in non-assault situations where the resistance or impediment or interference is a crime only because the identity of the federal officer is known. See *Burke* v. *United States*, 400 F. 2d 866, 868 (5th Cir. 1968).* The most obvious situation of that nature relates to a non-violent resistance or opposition to arrest. But the conflict in opinion is no less applicable to a non-violent interference in the form of a traffic violation, such as here occurred. That conflict deserves resolution by this Court.

2. In arguing that the tin ingots were still moving in foreign commerce when stolen, the Government

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* As explained in *Burke*, the conflict arises in cases relating to prohibited acts other than assault, where the accused person "forcibly resists . . . opposes, impedes, intimidates, or interferes with" the federal officer. In those situations, "it may well be that . . . it would be necessary for the court to charge the jury in terms that would make it essential to show that the accused person knew of the identity of the government official as such in order for him to be guilty of wilfully violating the statute." 400 F. 2d at 868.

relies (Opp. Br. 8-9) on *United States* v. *Yoppolo*, 435 F. 2d 625 (6th Cir. 1970), as indicative of the continuity of commerce until delivery to the ultimate consignee. But in *Yoppolo*, the so-called ultimate consignee, the Ohio Department of Liquor Control, had been named as the addressee on each case of the imported whiskey. 435 F. 2d at 626. In the instant situation, however, the only consignee identified in the bill of lading or elsewhere was Phillips Brothers. There was no proof of other parties having contracts for delivery of the ingots from Phillips. As far as the record indicates, the ultimate consignee was Phillips and, under the foreign commerce concept accepted by the Government, such commerce must have ceased when delivery was made to that sole consignee.

3. Finally, the Government asserts (Opp. Br. 11) that petitioner has made no showing that any conspiracy evidence introduced against him or his co-defendants was inadmissible for the purpose of proving the substantive counts of the indictment (constructive possession of the stolen tin and aiding and abetting in that possession). What the Government fails to point out, however, is that part of the conspiracy evidence admitted against the co-defendants and against the petitioner as co-conspirator was (1) testimony that one of the co-conspirators had threatened the life of another to keep him from revealing their criminal conduct; (2) testimony of prior crimes by some of the co-conspirators involving the same kind of criminal activity; and (3) testimony as to falsification of records by certain co-conspirators in order to conceal the criminal acts here involved. The Government relied on such evidence in the courts below to help sustain the finding as to a conspiracy.

The petitioner Gimelstob had no connection with those alleged actions, and such evidence was admissible as against Gimelstob only because he was an alleged co-conspirator during the trial. That evidence was not admitted as against Gimelstob on the substantive counts. And, once Gimelstob was acquitted of the conspiracy charge at the end of the trial, that evidence did not suddenly change its spots so as to become applicable to the substantive charges. The evidence had no relation to alleged possession. Only undue prejudice to petitioner could result from its use as to the substantive counts.

But the trial judge practically directed the jury to consider that conspiracy evidence in assessing Gimelstob's guilt under the substantive counts. He charged generally that the jury "may consider evidence that has been adduced as against Gimelstob with respect to the [possession and aiding and abetting] charges." Tr. 3572. No clearer showing could be had "of the improper use against him of conspiracy evidence introduced in relation to his co-defendants." (Opp. Br. 11).

The record, in short, is clear that the courts below did not take adequate steps to preclude the use of conspiracy evidence in assessing petitioner's guilt under the substantive counts. That failure conflicts with the standards promulgated by this Court in *Schaffer* v. *United States* 362 U. S. 511 (1960), and with the precise holding on virtually identical facts in *United States* v. *Patrisso,* 262 F. 2d 194 (2nd Cir. 1958).

CONCLUSION

For these reasons, supplementing those in the Petition, certiorari should be granted.

Respectfully submitted,

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September 25, 1973

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1618

HERBERT MARTIN GIMELSTOB, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR REHEARING

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November 2, 1973

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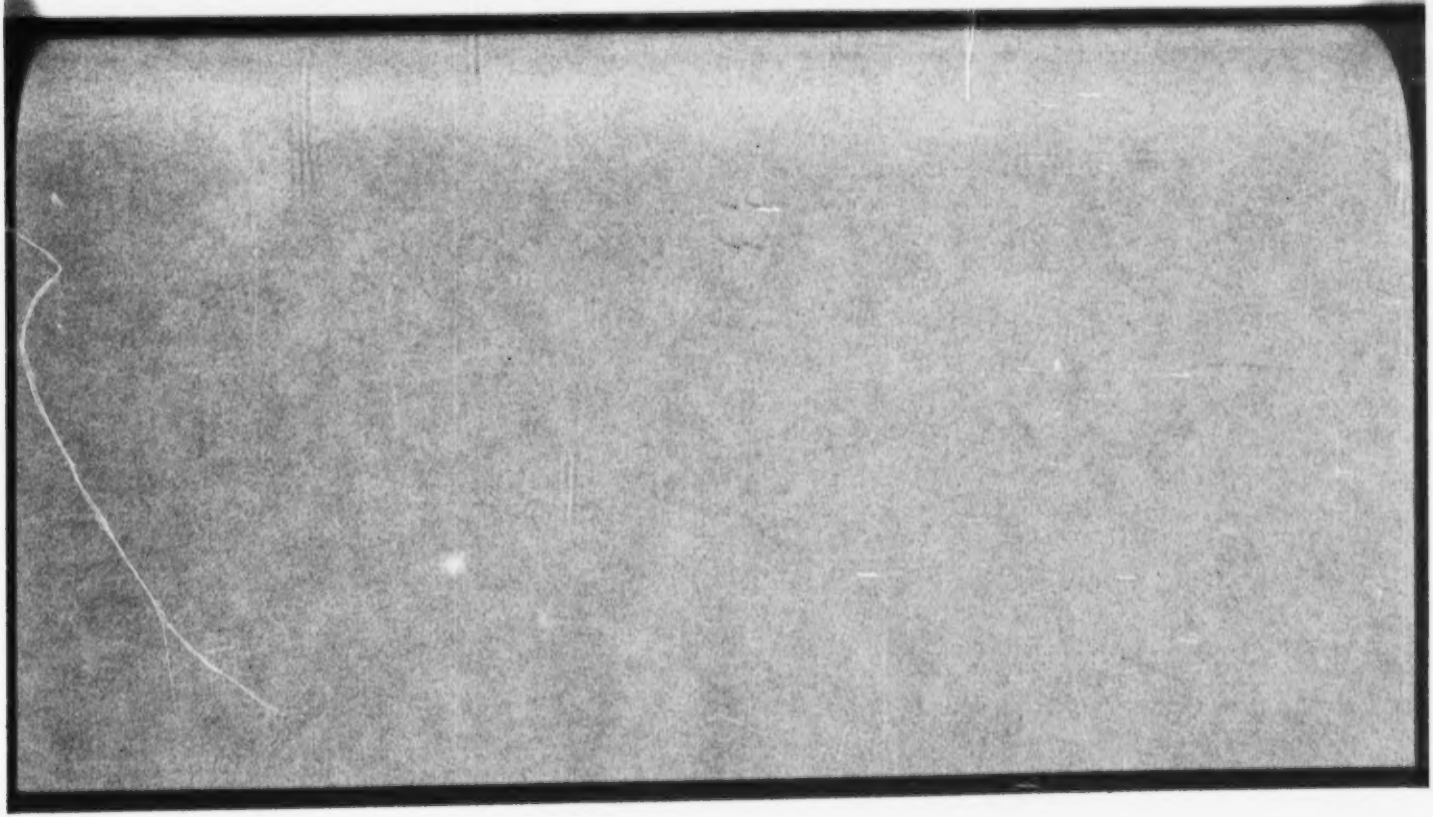

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PETITION FOR REHEARING

Pursuant to Rule 58(2), the petitioner respectfully moves this Court for an order (1) vacating its order denying the petition for writ of certiorari, entered on October 9, 1973, and (2) granting the petition for writ of certiorari. As grounds for this motion, petitioner states the following:

A. The Conceded Conflict as to 18 U.S.C. § 111

Section 111 of Title 18, U.S.C., punishes anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any . . . [federal officer] while engaged in or on account of the performance of his official duties." The critical problem raised by the Petition for Writ of Certiorari (Question Presented No. 2) was whether in a trial for a violation of § 111 the Government must prove that the defendant had knowledge of the official status of the federal officer in a non-assault situation where no crime was involved. The petitioner here was charged solely with having impeded or interfered with an F.B.I. agent pursuing stolen items by maneuvering a car so as to slow down the F.B.I. agent's car—a traffic offense at most, since no touching of the agent or his car was involved.

The Solicitor General has conceded (Op. Br. 7) that "in certain situations where the defendant's conduct is apparently a reasonable response to the acts of the unidentified officer" or "where the charge is resisting arrest," a conflict exists among the Circuits as to whether *scienter* is material—i.e., whether the Government must prove that the defendant knew that he was interfering with a *federal* officer. Actually, the existing conflict is broader than that, *scienter* being required by some courts wherever the interference is of a non-assault or non-criminal variety. See Pet. Reply Br. 2.

It is important to the proper administration of federal criminal justice that this conflict be resolved, particularly in the context of a case that involves so obvious a non-assault traffic violation. It may well be, as was suggested to but not resolved by the Second Circuit in *United States* v. *McKenzie*, 409 F. 2d 983, 986 (2nd

Cir. 1969), "that § 111 is essentially a jurisdictional statute . . . [that] provides a federal forum for the common law crimes of assault and resisting arrest in cases where the victim is a federal officer." Traditionally, knowledge of the identity of the victim is not necessary to constitute the crime of assault. But where the applicability of a federal statute depends not upon such an assault having been committed but upon some non-criminal form of interference, the element of *scienter* may become critical to the applicability of federal jurisdiction. Then the focus of the federal crime is not the independent crime of assault but a non-criminal interference with a federal officer. But for the presence of a *federal* officer, no basis would exist for the exercise of federal criminal power. *Scienter* would thus seem essential in this situation.

As was said by this Court with respect to the federal Travel Act, *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), an expansive application of § 111 "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers [or, as in the instant situation, the federal status of an automobile driver], a matter of happenstance, would transform relatively minor state offenses into federal felonies." And certainly, in addition, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis*, 401 U.S. at 812.

Moreover, § 111 in this context seeks to make a federal crime out of interference with a person having the "status" of a federal officer. Making "status" the fulcrum of any crime presents serious constitutional questions. See *Robinson* v. *California*, 370 U.S. 660 (1962), holding unconstitutional a state statute making

criminal the "status" of narcotics addiction. While "this Court has never articulated a general constitutional doctrine of *mens rea*," *Powell* v. *Texas*, 392 U.S. 514, 535 (1968, opinion of Marshall, J.), it may well be that *mens rea* should be engrafted upon § 111 in order to avoid any constitutional questions that might otherwise arise.

These considerations, not presented in the Petition for Writ of Certiorari, fully justify a reconsideration of the order denying certiorari.

B. The Other Questions Presented

The third Question Presented in the Petition dealt with the definition of the termination of foreign commerce, where the goods in transit had been unloaded from aboard ship, delivered to and warehoused by the one and only consignee, and weighed and broken into lots within the warehouse.

Here again, the decision below that the stealing of the imported tin occurred while it was still in foreign commerce, despite its having been delivered to the named consignee, constitutes a highly questionable expansion of a federal criminal statute (18 U.S.C. § 659) into an area generally reserved to state criminal law. Both the Petition and the Government's opposing brief demonstrate that no decision of this Court has dealt with § 659 in terms of the propriety of a free-wheeling expansion of the statute into state law areas. Indeed, a recent decision of the Seventh Circuit, rendered after the Petition was filed, has dramatically illustrated the tendency of lower courts to give such an expansionist interpretation to § 659. In *United States* v. *Parent*, Nos. 72-1419, 72-1504 and 72-1600.

rendered on July 18, 1973, the Seventh Circuit held that a manufacturer's mere intent to ship mini-bikes across state lines, coupled with preparatory steps for yielding possession of the goods, was sufficient to constitute them a "interstate shipment" for purposes of § 659.

While the *Parent* decision deals with the commencement of an interstate shipment rather than the termination of a foreign shipment, it does in combination with the decision below involve the federal courts in an entirely new and perhaps limitless arena of criminal litigation. Little more than the intent of a shipper or consignee, even though the goods remain at rest, seems to be enough to activate the criminal sanctions of § 659. Nothing in the legislative history justifies so broad an application. In fact, in 1966 Congress expressly amended § 659 to provide: "Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter . . ." Act of Oct. 14, 1966, 80 Stat. 904.

The judicial approach to § 659 that is consistent with Congress' intention is best expressed in *United States* v. *Altobella*, 442 F. 2d 310, 315 (7th Cir. 1971): "[T]here is nothing about the appellants' enterprise, as disclosed by the evidence, which suggests any reason why state police powers need to be supplemented by the federal government." To that end, the denial of certiorari in this case should be reconsidered.

Finally, petitioner renews and reiterates the first Question Presented, dealing with the failure of the trial judge to instruct the jury that the petitioner had been

acquitted of conspiracy at the end of the trial and that the highly prejudicial conspiracy evidence should not be considered by the jury in assessing petitioner's guilt under substantive counts. Nothing that the Solicitor General has said explains the failure of the trial judge thus to meet the standards promulgated by this Court in *Schaffer* v. *United States*, 362 U.S. 511 (1969). Nothing that the Solicitor General has said distinguishes the Second Circuit's *Patrisso* ruling, 262 F. 2d 194, which is virtually on all fours in terms of the facts and which is in direct conflict with the Third Circuit ruling below. That question, too, deserves reconsideration by this Court to the end that review thereof may be had.

CONCLUSION

For these reasons, rehearing should be granted, the order denying certiorari should be vacated and the Petition granted.

Respectfully submitted,

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November 2, 1973

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

EUGENE GRESSMAN